

on page 2 of the title which is August 18, 1964, then the first applicant would in theory be free to deal with the said property before the date of registration and therefore would be contrary to the very object of the restriction in interest. I think this line of argument is purely hypothetical and does not arise at all in this case. Furthermore it is to be observed that when the first applicant was informed that his application for land was approved the same letter which conveyed the approval also conveyed the express conditions and the restriction in interest imposed on the land.

It would seem clear that as a result of the endorsement at page 2 of the title there was a mistake on the part of the applicants as to the expiry date of the restriction in interest on the land. But as Salmond J. said in *Boyd v. Mayor etc. of Wellington*⁽³⁾:—

"I can see no difference in this respect between an instrument which is void because 'unknown to the parties' it is a forgery and one which is void executed by an infant or by an attorney without authority or by mistake or *ultra vires*."

My conclusions are therefore as follows:—

- (a) Since registration is the cornerstone of the Torrens system the restriction in interest on the land in question commenced from the date of the registration of the register document of title i.e. November 9, 1967 and will cease to operate only after 15 years from that date;
- (b) Section 105(1) of the National Land Code (providing for the commencement of a restriction in interest) must be read together with section 78(3) of the Code (providing how alienation is effected) to give a proper interpretation as to when the period of restriction in interest begins to run;
- (c) In determining the period during which the restriction in interest is in force according to law, the endorsement purporting to show the date on which title of the said land was granted (August 18, 1964) appearing at page 2 of copy of title being an administrative act should be ignored.

Application is dismissed with costs.

Application dismissed.

Solicitors: *Allen & Gledhill.*

ZAINAL ABIDIN BIN HAJI ABDUL RAHMAN v. CENTURY HOTEL SDN. BHD.

[O.C.J. (Hashim Yeop A. Sani J.) October 6, 1981]

[Kuala Lumpur — Civil Suit No. F 252 of 1981]

Practice and Procedure — Application for order to restrain defendant from selling, transferring or in any manner disposing of land until disposal of suit — Mareva Injunction — Whether High Court has power to grant application — Jurisdiction and power of High Court — Remedy of plaintiff before judgment — Debtors Ordinance, 1957, s. 19 — Specific Relief Act, 1950, ss. 50 & 51 — Courts of Judicature Act, 1964, s. 25 and Schedule, paragraph 6 — Civil Law Act, 1956, s. 3 — Federal Constitution, art. 121.

Jurisdiction — Mareva injunction — Court has no power to grant such an injunction.

In this case the plaintiff had entered into an agreement with the defendant company whereby the defendant company let to the plaintiff the whole of the third floor of the building known as Century Hotel for a period of three years for the purpose of running a recreational centre. The plaintiff claimed that he had carried out extensive renovations to the premises and that he had paid all rents due punctually. He alleged that the defendants in breach of the agreement prevented the plaintiff and his agents from entering the premises.

A The plaintiff had brought a suit against the defendants claiming damages arising from the alleged breach of agreement amounting to approximately \$5,000,000. He also alleged that from newspaper reports it appeared that the defendant intended to close down the business of the hotel and that there was a probability that the surplus assets of the defendants would be appropriated by a company which wholly controlled it. The lands and building known as Century Hotel were the only substantial assets of the defendants. The plaintiff applied for a restraining order to restrain the defendant company from selling, transferring or in any manner howsoever disposing of any of the lands and building known as Century Hotel until the disposal of the main suit or further order. Counsel for the plaintiff stated that the plaintiff was in effect asking for a *Mareva* injunction and it was argued that section 25 of the Courts of Judicature Act 1964 and section 51 of the Specific Relief Act would empower the High Court to grant such a restraining order.

C **Held:** (1) although the jurisdiction of the High Court is unlimited in the sense that it is as wide a jurisdiction as that of the High Court in England, the expression "unlimited jurisdiction" only describes the extent or area where the judicial authority or power of the High Court is exercisable. The manner in which the judicial authority or power is exercised is not unlimited, as the High Court is a creature of statute and all its powers must be derived from a written law, expressly or by necessary implication;

D (2) the remedy sought by the plaintiff in the notice of motion is unknown in our law. The only remedy available to the plaintiff before judgment according to our law is that provided by section 19 of the Debtors Ordinance 1957 upon satisfying the court of the requirements of the section;

(3) the types of restraining orders that can be granted by the High Court are restricted to those described in the Specific Relief Act, 1950 and paragraph 6 of the Schedule to the Court of Judicature Act, 1964;

E (4) in this case the affidavit of the plaintiff did not disclose sufficient grounds to justify any intervention by the court.

Per curiam: The High Court here possesses no power to grant restraining order of the nature described as the *Mareva* injunction. We simply have no statutory provision corresponding to section 45 of the English Courts of Judicature (Consolidation) Act, 1925.

F *Cases referred to:—*

- (1) *Bekhor & Co. Ltd. v. Bilton* [1981] 2 W.L.R. 601 & 610.
- (2) *Nippon Yusen Kaisha v. Karageorgis* [1975] 3 All E.R. 282.
- (3) *Mareva Compania Naviera S.A. v. International Bulk-carriers S.A.* [1975] 2 Lloyd's Rep. 509.
- (4) *Prince Abdul Rahman bin Turki Al Sudairy v. Abu Taha* [1980] 1 W.L.R. 1268.
- (5) *Searose Ltd. v. Seatrain Ltd.* [1981] 1 W.L.R. 897.
- (6) *Faith Panton Property v. Godgette* [1981] 2 All E.R. 877, 883.
- (7) *Lister Co. v. Stubbs* (1890) 45 Ch. D. 1 & 13.
- (8) *Barclay-Johnson v. Yuill* [1980] 3 All E.R. 190.
- (9) *Ponniah v. Chinniah* [1961] M.L.J. 66.
- (10) *Lee Lee Cheng (f) v. Seow Peng Kwang* [1960] M.L.J. 1 & 3.
- (11) *H.G. Warren v. Tay Say Geok & Ors.* [1965] 1 M.L.J. 44.
- (12) *Kepong Prospecting Ltd. v. Schmidt* [1962] M.L.J. 375.
- (13) *Nowroji Pudumjee Siradar v. The Deccan Bank Ltd.* I.L.R. 45. Bom. 1256; A.I.R. 1921 Bom. 69.

I **CIVIL SUIT.**

Sri Ram for the plaintiff.

Raja Abdul Aziz Addruse for the defendant.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: In this notice of motion the plaintiff asks for a restraining order to restrain

the defendant company from selling, transferring or in any manner howsoever disposing of any of the lands held in Certificate of Title No. 10331 and Certificate of Title No. 10332 in the Town and District of Kuala Lumpur and the building known as Century Hotel situated thereon until the disposal of the main suit or until further order.

The background facts are briefly as follows. The plaintiff entered into an agreement in writing dated September 6, 1980 with the defendant company letting to the plaintiff the whole of the third floor of the said building for a period of 3 years upon terms and conditions set out in the agreement. The premises were let out for the purpose of business of a recreational centre for which the plaintiff claims he had carried out extensive renovations costing him approximately \$108,136.25. He claims that all rents were paid out punctually. Business commenced from November 1, 1980 until August 7, 1981. Then the plaintiff alleges that the defendants in breach of the agreement prevented the plaintiff and his agents from entering the premises. In the main suit the plaintiff is claiming for damages against the defendant arising from the alleged breach of agreement amounting to approximately \$5,000,000.

For the restraining order the plaintiff is relying on the grounds set out in paragraphs 14, 15 and 16 of his affidavit sworn on September 3, 1981. Firstly it is alleged in these paragraphs that the said lands and building are the only substantial assets of the defendant. Secondly, from extracts of newspaper reports attached to the affidavit the defendant would seem to have declared its intention to close down the business of the hotel and the nature of these newspaper reports is such as to give the impression (at least to the plaintiff) that the defendant is *wholly controlled* by another limited company known as Paremba Berhad. In paragraphs 19 and 20 of the same affidavit the plaintiff also alleges that there is a *serious probability* that the surplus money would be appropriated by the said Paremba Berhad leaving the defendant a "worthless shell" and therefore will not be able to satisfy any judgment which the plaintiff may obtain.

At the outset counsel for the plaintiff stated unequivocally that the notice of motion is in effect asking for a "*Mareva* Injunction" which, it is admitted however, has never been granted in this country. According to him section 25 of the Courts of Judicature Act, 1964 and section 51 of the Specific Relief Act would empower the High Court in this country to grant such restraining order. The grounds set out in paragraphs 14, 15, 16, 19 and 20 of the affidavit of the plaintiff in support of the notice of motion are sufficient he contends to justify the granting of such a restraining order.

The *Mareva* injunction has only been known in England for the last 6 years or so. A summary of the history of the *Mareva* injunction is to be found in the judgment of the Court of Appeal in *Bekhor & Co. Ltd. v. Bilton*.⁽¹⁾ It began with *Nippon Yusen Kaisha v. Karageorgis*⁽²⁾ where although the charterers could not be traced there was however evidence that they had funds with a bank in London. An *ex parte* application to grant an injunction restraining the char-

terers from disposing of or removing from the jurisdiction any of the assets which were within the jurisdiction was refused at first instance but granted in the Court of Appeal. A month later a very similar case came before the Court of Appeal, *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*⁽³⁾ which was another *ex parte* application and a similar injunction was made.

The nature of the *Mareva* injunction is that it restrains the defendant from removing from jurisdiction or otherwise disposing of or dealing with any of the assets within jurisdiction. This jurisdiction was extended by Lord Denning in *Prince Abdul Rahman bin Turki al Sudairy v. Abu Taha*⁽⁴⁾ where it was ruled that the jurisdiction applied even if the defendant was not a foreigner or foreign based, since the essence of the jurisdiction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action.

The real scope of the *Mareva* injunction is in my view set out in the case of *Searose Ltd. v. Seatrains Ltd.*⁽⁵⁾ where Goff J. said at page 897:

"It follows that, first, an order for a *Mareva* injunction should not be sought in terms wider than are reasonably required in the circumstances of the case. Secondly, any asset in respect of which an order for a *Mareva* injunction is sought should be identified with as much precision as is reasonably practicable. Thirdly, as regards any asset to which the order applies but which has not been identified with precision in the form of order proposed, e.g. money held in an unidentified bank account, the plaintiff may be required to give an undertaking to pay reasonable costs incurred by any person (other than the defendant) to whom notice of the terms of the injunction is given, in ascertaining whether or not any asset to which the order applies, but has not been identified in it, is within his possession or control."

Brandon L.J. in *Faith Panton Property v. Godgetts*⁽⁶⁾ from page 883 distinguishes the pre-*Mareva* and post-*Mareva* practice. The basic tenet of the pre-*Mareva* practice was expressed by Cotton L.J. in *Lister Co. v. Stubbs*⁽⁷⁾:—

"I know of no case where, because it was highly probable that if the action was brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree."

Then Brandon L.J. traces the history and development of the *Mareva* injunction ending with its extension in *Prince Abdul Rahman* case. Brandon L.J. concluded that although the modern doctrine of the *Mareva* injunction has developed rapidly since it was first applied in 1975 it has never been applied to a case in which "no foreign element of any kind exists."

Before deciding to grant or withhold the restraining order it is imperative first of all to know exactly what in essence is the *Mareva* injunction? In *Faith Panton Property v. Godgetts* Brandon L.J. said that he could see the force of the argument that the only real issue in which a *Mareva* injunction should depend on was that of jeopardy by which is meant a real risk that defendant whatever his nationality, domicile or residence might be, against whom a plaintiff had a good claim, might dispose of or dissipate his assets, either abroad or here so as to prevent the plaintiff from executing his judgment. But it would seem clear that the court there declined to make any ruling

whether foreign element is essential in view of the pending amendment to section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The same principle of the *Mareva* injunction as stated by Sir Robert Megarry V.C. in *Barclay-Johnson v. Yuill*⁽⁸⁾ was cited with approval in *Prince Abdul Rahman* that:

"...the heart and core of the *Mareva* injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action."

After ascertaining what in essence is the restraining order sought by the plaintiff the next question to answer in the present case is can our courts issue that type of injunction?

The basis of the power for the grant of the *Mareva* injunction in England is section 45(1) of the 1925 Act, which provides that:

"The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do."

All our courts are creatures of statute. Article 121 of the Federal Constitution provides that the judicial power of the Federation shall be vested in two High Courts (Malaya and Borneo) of co-ordinate jurisdiction and in such inferior courts as may be provided by Federal law.

The powers of the High Court here are provided by section 25 of the Courts of Judicature Act, 1964 and in matters of injunctions sections 50 and 51 of the Specific Relief Act, 1950 and paragraph 6 of the Schedule to the 1964 Act.

Section 25 of the Courts of Judicature Act, 1964 reads as follows:—

"25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of sub-section (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same."

Sections 50 and 51 of the Specific Relief Act read as follows:—

"50. Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

51.(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff."

Paragraph 6 of the Schedule to the Courts of Judicature Act, 1964 provides as follows:

"6. Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever."

- A It is clear from the language of section 25 of the Courts of Judicature Act, 1964 that when we speak of the powers of the High Court now we have to consider the powers of the High Court before Malaysia Day and before the Courts of Judicature Act, 1964 which repealed Part V of the Federation of Malaya Courts Ordinance, 1948 relating to the High Court. Section 47 of the 1948 Ordinance provided that the original civil jurisdiction of the High Court shall be as set out in the second Schedule to the Ordinance. Paragraph 1 of the second Schedule to the Ordinance provided that the jurisdiction and authority of the High Court here shall be of the like nature and extent as the jurisdiction and authority exercised by the Chancery and King's Bench Divisions of the High Court of Justice in England.
- B
- C

Referring to the civil jurisdiction of the High Court in the Federation of Malaya before Malaysia Day, Thomson C.J. (as he then was) delivering the judgment of the Court of Appeal in *Porniah v. Chinniah*⁽⁹⁾ said generally that the High Court possessed unlimited civil jurisdiction. He said at page 67:

"The court, however, possesses unlimited civil jurisdiction (see Articles 121 and 172 of the Constitution and Clause 77 of the Federation of Malaya Agreement), and in the absence of any express provision in any Enactment (and I have been unable to discover any) it seems impossible to argue that the rule quoted gives the Commissioner of Lands in Johore such exclusive jurisdiction in the matter as to oust the jurisdiction of the court."

- E But it was in an earlier case of *Lee Lee Cheng (f) v. Seow Peng Kwang*⁽¹⁰⁾ that Thomson C.J. dealt in great length on this interesting point. The real issue of the appeal was whether the High Court had power to enlarge the time prescribed by section 8(3)(b) of the Civil Law Ordinance then. On this point he clearly said at page 1 of the judgment that the Civil Law Ordinance had no provision of any sort giving the court power to extend the period. He also distinguished "jurisdiction" and "power" in the judgment.
- F

At page 3 of the judgment the learned Chief Justice said:—

- G "Clause 77 of the Agreement provides that the Supreme Court shall be a court of unlimited jurisdiction, that it shall consist of a High Court and a Court of Appeal and that its constitution, powers and procedure may be prescribed by Federal Ordinance. Clearly here "jurisdiction" is unlimited. But unlimited jurisdiction cannot mean unlimited power because as regards the powers of the court it is provided that these may be prescribed by Federal Ordinance and in the nature of things something which is unlimited cannot be capable of being prescribed. This leads to the conclusion that the expression 'jurisdiction' is used as meaning the authority of the court to exercise any judicial power that is given to it by the law and that when the Clause says that jurisdiction is unlimited it means that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorises or requires judicial power to be exercised."
- H

- I Thus clause 77 of the Federation of Malaya Agreement 1948 established the superior courts that existed immediately before Malaysia Day. That clause provided that there shall be a court of "unlimited civil and criminal jurisdiction" to be called the Supreme Court of the Federation of Malaya consisting of a High Court and a Court of Appeal. Article 121 of the present Constitution (which carries the same provision from the Merdeka Constitution) vests the judi-

cial power of the Federation in the superior courts and such inferior courts as may be provided by Federal law. Article 128(1) of the Merdeka Constitution provided that the superior court was to have "such original, appellate and revisional jurisdiction as may be provided by Federal law."

I did not have the benefit of arguments on the powers of the superior courts before Malaysia Day and in fact the two Court of Appeal judgments, referred to earlier were not cited by either counsel. However, in my opinion the following propositions can properly be deduced:—

- (1) The jurisdiction of the High Court is "unlimited" in the sense that it is as wide a jurisdiction as that of the High Court in England;
- (2) The expression "unlimited jurisdiction" however merely describes the extent or area where the judicial authority or power of the High Court is exercisable;
- (3) The manner in which the judicial authority or power of the High Court is exercised is not unlimited;
- (4) Because the High Court is a creature of statute, all its powers must be derived from a written law, expressly or by necessary implication.

I think it is on this rationale that section 3 of the Civil Law Act, 1956 directs our courts to apply the common law of England. In the judgment of the Privy Council in *H.G. Warren v. Tay Say Geok & Ors.*⁽¹¹⁾ Lord Hodson said in the judgment at page 45:—

"By section 3 of the Civil Law Ordinance 1956 the Courts of Malaya apply the common law of England and the rules of equity as there administered save in so far as other provision is made by any written law in force in the Federation. There is a proviso that such law and rules shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

In my opinion it is clear then that the High Court here possesses no power to grant restraining orders of the nature described as the *Mareva* injunction. We simply have no statutory provision corresponding to section 45 of the English Courts of Judicature (Consolidation) Act, 1925.

Indian authorities are of no assistance because we have no provision corresponding to Order XXXIX rule 1(b) of the Indian Civil Procedure Code. Neither do we have any provision corresponding to section 151 of the Indian Procedure Code which reads:

"151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

to which Hepworth J. referred in his judgment in *Lee Lee Cheng (f)* at page 5.

In short, in matters of granting or withholding an injunction the source of the power of the High Court here is in the express statutory provisions of sections 50 and 51 of the Specific Relief Act, 1950 and in paragraph 6 of the Schedule to the Courts of Judicature Act, 1964. The only situation which allows

our court to intervene before judgment is the statutory provision in section 19 of the Debtors Ordinance, 1957. The words of subsection 1(c) of that section would seem to incorporate the provision of Order XXXVIII rule 5 of the Indian Civil Procedure Code in that if it be shown to the court that the plaintiff has a good cause of action against the defendant and the defendant with intent to obstruct or delay execution of any judgment has removed or tried to remove any of his movable or immovable property the court may order the property to be seized or attached. This provision of the Debtors Ordinance, 1957 is to my mind the only provision we have to enable intervention by the court before judgment. When dealing with section 19 of the Debtors Ordinance, 1957, Thomson C.J. (as he then was) in *Kepong Prospecting Ltd. v. Schmidt*⁽¹²⁾ cited with approval the words of Sir Norman Macleod in *Nowroji Pudumjee Siradar v. The Deccan Bank Ltd.*⁽¹³⁾:—

"A man is not debarred from dealing with his property because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings he sells some of his property, that would be at once a sufficient ground to satisfy the court that he is disposing of his property with intent to defraud the plaintiff. Clearly there must be additional circumstances before the court can be satisfied that such an intention exists."

In my view, that has all along been the law in this country.

In conclusion I would dismiss the application on the following grounds:

- (a) The relief sought by the plaintiff in the notice of motion is unknown in our law;
- (b) The only remedy available to the plaintiff before judgment according to our law is provided by section 19 of the Debtors Ordinance, 1957 upon satisfying the court of the requirements of that section;
- (c) The types of restraining orders that can be granted by the High Court here are restricted to those described in the Specific Relief Act, 1950 and paragraph 6 of the Schedule to the Courts of Judicature Act, 1964; and
- (d) The affidavit of the plaintiff does not disclose sufficient grounds to justify any intervention by the court.

Application dismissed with costs.

Application dismissed.

Solicitors: *Sri Ram & Co.; Ariff & Co.*